

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
825 North Capitol Street, NE, Suite 4150
Washington, DC 20002

DISTRICT OF COLUMBIA
DEPARTMENT OF THE ENVIRONMENT
Petitioner,

v.

THOMAS E. MADISON
Respondent

Case No.: DE-I-07-A100985

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985, D.C. Official Code §§ 2-1801.01 – 1802.05, and Title 21, Chapter 5 of the District of Columbia Municipal Regulations (“DCMR”). By Notice of Infraction served May 31, 2007, the Government charged Thomas E. Madison (hereinafter “Respondent”) with a violation of 21 DCMR 538.1(f) for failing to protect stockpiled material with mulch or temporary vegetation and a violation of 21 DCMR 539.4 for failing to place adequate erosion control measures before and during exposure (the “Regulations”).¹ The Notice of Infraction alleged that Respondent violated the Regulations on

¹ 21 DCMR 538.1 states:

The following are guidelines for erosion and sediment control planning in the District of Columbia:

21 DCMR 538.1(f) provides:

Strip and stockpile topsoil for later use on areas to be stabilized by permanent vegetation. Protect the stockpiled material with mulch or temporary vegetation...

21 DCMR 539.4 provides:

May 29, 2007, at 822 Fifth Street, N.E. Ward 6 (the “Property”), and sought fines totaling \$1,000.00.

On June 18, 2007, the Respondent filed an answer to the Notice of Infraction by entering a plea of Deny. An evidentiary hearing was scheduled for August 7, 2007.

The Government appeared represented by the charging inspector, Pablo Gonzalez. Respondent appeared on his own behalf.

Based on the testimony of the witnesses, the documentary evidence received, and the entire record in this matter, I make the following findings of fact and conclusions of law.

II. Findings of Fact

Respondent Thomas E. Madison is the owner of the Property. The Property is a residential single family home.

On May 29, 2007, the charging inspector Pablo Gonzalez observed construction taking place in the rear of the 800 block of Fifth Street, N.E. Respondent was erecting a fence in the rear of the Property. Mr. Gonzalez observed that dirt, mud and other sediments were trailing into the alley near the Property. No erosion or sediment control measures were in place. Mr. Gonzalez took photos of his observations. Petitioner’s Exhibit “PX” 100-102. The photos reflect earth disturbing activities related to fence post holes being erected to construct a fence. Petitioner’s photos also taken on July 18, 2007 reflect the erected fence after construction was completed. PX 105.

Adequate erosion control measures shall be in place prior to and during the time of exposure.

The Respondent testified, and I so find, that this constructed fence project was less than \$2500. The trenches dug for the fence post holes were less than 50 square feet, *i.e.* one foot by 40 feet.

III. Conclusions of Law

A. Prior Notice

As a threshold matter, Respondent contends that issuing the Notice of Infraction was improper because he was not given an opportunity to abate the violation before being issued the Notice of Infraction. The Regulations do not support Respondent's position. Specifically, as this administrative court determined in *DOH v. Samuel H. Barnes* OAH No. DH-I-05-A100252 at 2 (Final Order, December 23, 2005), 16 DCMR 3101.6 provides: "Unless otherwise prescribed by law, an NOI shall be issued by the Director upon observance of an infraction. When applicable provisions of law require that Respondent be given a certain period of time to abate a violation, an NOI shall not be issued until that period of time has elapsed." As this court opined in *Samuel H. Barnes, supra*, "absent an applicable abatement provision, this Regulation authorizes the issuance of a Notice of Infraction upon observation of a violation." *Id. at 2*. Respondent has not pointed to an abatement period for the Regulations, nor is this administrative court aware of such. Accordingly, Respondent's argument that the Notice of Infraction was issued improperly is without merit.

B. No Liability for Violations of 21 DCMR 538.1 and 21 DCMR 539.4

The Government seeks to establish liability by charging the Respondent with violations of 21 DCMR 538.1 and 21 DCMR 539.4. Both Regulations pertain to requirements for adequate control measures that are in a plan approved by the Government. As this administrative court previously held, “adequate erosion control measures” is that which has been duly reviewed and approved by the Government as part of an erosion and sediment control plan. *See DOH v. Fine Earth Landscape, Inc. and Joel C. Hafner and Steve Chapman* OAH No. I-00-10694 at 5 (Final Order January 7, 2003); *see also* 21 DCMR 502.1 (providing that the approval of a building permit shall be conditioned upon the submission of an erosion and sediment control plan which has been reviewed and approved by the Government); *see also* 21 DCMR 503.2 (providing authority for Government to disapprove an erosion and sedimentation control plan if it is found to be inadequate).

The issue to address is whether or not the Respondent was required to submit an erosion and sedimentation control plan for erecting his fence in his backyard. The controlling Regulations are 21 DCMR 543.1 and 21 DCMR 543.2, which state:

- 543.1 A project shall be classified and processed as a Minor Project if it meets the following criteria:
- (a) less than fifty square feet (50ft.) of earth is disturbed; or
- (b) the total construction cost does not exceed twenty five hundred dollars (\$2500)
- 543.2 A plan shall not be required when earth disturbing activities are limited to individual spared footings to support columns, fence post holes, and for utility service connections and repairs. Applicants in this category shall complete the Application for Minor Construction projects (ES-560)

Based on the express language of 21 DCMR 534.2, I conclude that the Respondent was not required to submit an erosion and sediment control plan for his fence project. Accordingly, the Government has failed to meet its burden of proving by a preponderance of evidence that the Respondent violated 21 DCMR 538.1(f) and 21 DCMR 539.4 because the Respondent raised a valid and credible defense. First, I credit Respondent's testimony that the construction of the fence was less than \$2500, which places him squarely within the guidelines of completing a Minor Project pursuant to 21 DCMR 543.1. Respondent was not charged with failing to have a Minor Project Application. Therefore, I am limited to weighing the facts based on the charges set forth in the Notice of Infraction.

Second, 21 DCMR 543.2 clearly establishes that a plan is not required when earth disturbing activities are limited to fence post holes. All of the available evidence reflects Respondent completing work related to fence post holes and nothing more.

Accordingly, the Respondent is not liable and this case is dismissed with prejudice.

IV. Order

Based upon the above findings of fact and conclusions of law, and the entire record of this case, it is this 17th day of August 2007:

ORDERED, that Respondent is **NOT LIABLE** for violation of 21 DCMR 538.1(f) and 21 DCMR 539.4 as set forth in the Notice of Infraction (No. A100985); and it is further

ORDERED, that the herein case is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED, that the appeal rights of any person aggrieved by this Order are stated below.

August 17, 2007

/s/ _____
Claudia Barber
Administrative Law Judge